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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., and BRIAN RUMBAUGH,

Petitioners – Cross-Respondents,

v.

WALTER LEE, Superintendent of Port Authority Police,

Respondent – Cross-Petitioner.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT–CROSS-PETITIONER

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QUESTIONS PRESENTED

The Port Authority of New York and New Jersey, the agency that operates the three major New York metropolitan area airports, restricts the repetitive solicitation of contributions and distribution of literature to the sidewalks adjacent to airport terminal buildings. The restriction is imposed as a means of promoting the safe, efficient and convenient use of those buildings by air travelers. The International Society for Krishna Consciousness, Inc., and one of its members, challenge the restrictions as violating the First Amendment to the United States Constitution.

The questions presented are:

1. Are the interior areas of airport terminal buildings, which have as their sole purpose the facilitation of safe, efficient and convenient air travel, public fora?

2. Is a restriction limiting the repetitive solicitation of money and distribution of literature to the sidewalks adjacent to airport terminal buildings, which have as their sole purpose the facilitation of safe, efficient and convenient air travel, valid under the First Amendment?

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BRIEF OF RESPONDENT—CROSS-PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix to Petition for Writ of *Certiorari*, at 1-28) is reported at 925 F.2d 576 (2d Cir. 1991). The opinion of the District Court (Appendix to Petition for Writ of *Certiorari*, at 30-48) is reported at 721 F. Supp. 572 (S.D.N.Y. 1989).

JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 1991. A Petition for Rehearing with Suggestion for Rehearing *En Banc* was timely filed, and was denied on April 25, 1991. The Petition for a Writ of *Certiorari* (No. 91-115) was filed on July 24, 1991. The Cross-Petition for a Writ of *Certiorari* (91-339) was filed on August 26, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1988).

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

U.S. Const. amends. I and XIV.

Airport Rules and Regulations of The Port Authority of New York and New Jersey:

Chapter III, Part B, as amended by resolution dated February 11, 1988, provides in pertinent part as follows:

> "B. Non-commercial activity at Port Authority air terminals which are not occupied by a lessee, licensee or permittee is subject to the following conditions and restrictions:
>
> 1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:
>
> . . .
>
> (b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.
>
> (c) The solicitation and receipt of funds."

STATEMENT OF THE CASE

In the interest of preserving the air terminal buildings at its airports for the air travel purpose to which they are dedicated, The Port Authority of New York and New Jersey restricts the repetitive solicitation of contributions and distribution of literature to the sidewalks adjacent to the air terminal buildings. Petitioners – Cross-Respondents challenge this restriction as violating the First Amendment to the United States Constitution.

A. The Parties

Petitioners – Cross-Respondents, plaintiffs below, are the International Society for Krishna Consciousness, Inc. ("ISKCON"), a not-for-profit religious organization, and a member of ISKCON.[1] Plaintiffs engage in the practice of *sankirtan*, which consists of "going into public places, disseminating religious literature and soliciting funds to support the religion." (Plaintiffs' Statement of Facts in Support of Motion for Summary Judgment, dated November 11, 1987 ("Plaintiffs' Statement") at ¶ 3 (JA 138))[2].

Respondent – Cross-Petitioner Walter Lee, defendant below, was Superintendent of the Port Authority Police when this suit began.[3] The Superintendent is an employee of The Port Authority of New York and New Jersey. The Port Authority was created in 1921 by a Congressionally-consented-to Compact between the States of New York and New Jersey to develop public transportation, terminal, and other facilities of commerce within the

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[1] Hereinafter, the Petitioners – Cross-Respondents will be referred to as "Plaintiffs."

[2] "JA" followed by numerals refer to pages in the Joint Appendix. "PA" followed by numerals refer to pages in the Appendix to the Petition for a Writ of *Certiorari*.

[3] Walter Lee no longer holds this position. The caption has not been amended to substitute another named defendant. *See* Petition at 3 n.3.

Hereinafter, the Respondent – Cross-Petitioner will be referred to as "Superintendent."

statutorily defined Port District. 42 U.S. Stat. 174 (1921).[4] At the present time, pursuant to the 1921 Compact and subsequent bi-State legislation supplementary thereto, the Port Authority owns and/or operates thirty-seven (37) such facilities, including John F. Kennedy International Airport ("Kennedy"), La Guardia Airport ("La Guardia") and Newark International Airport ("Newark"). These three airports constitute the busiest and most heavily used metropolitan airport system in the world. In 1986, they served approximately 79 million travelers, constituting about eight percent of the United States' domestic flights, and over one-half of the United States' trans-Atlantic flights. It is estimated that the passenger load of the airports will increase to 110 million by the year 2000 (PA 4).

The Port Authority is charged with operating the three airports for the benefit of the people of New York and New Jersey. N.Y. Unconsol. Laws §6634 (McKinney 1979); N.J. Stat. Ann. §32:1-35.4 (West 1963). In accordance with its statutory authority, the Port Authority has leased much of the space in the airports to numerous airlines. Under these leases, the airlines exercise primary control over the leased areas, although the Port Authority retains certain supervisory powers (Civil Rule 3(g) Statement of Defendant Superintendent, dated January 19, 1988 ("Superintendent's Statement"), ¶¶ 32-38 (JA 452-53); Plaintiff's Statement, ¶¶ 146-49 (JA 176-77)). The Port Authority retains complete control over all unleased areas (Superintendent's Statement, ¶ 29 (JA 452)). It is only the unleased areas of the airports within Port Authority control that are the subject matter of this appeal (PA 4, 32).[5]

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[4] The Compact is codified at N.Y. Unconsol. Laws §§6401-6423 (McKinney 1979); N.J. Stat. Ann. §§32:1-1 to -24 (West 1963).

[5] Originally, this action concerned restrictions in all areas of the airport, both leased and unleased; and the airlines which lease space at airports were also defendants. However, over the course of the litigation, Plaintiffs agreed to withdraw their claims with respect to leased areas, and only the claims with respect to the unleased areas of the airports that are within Port Authority control remained for determination by the District Court (PA 4, 32).

(Footnote continued)

B. Description of The Port Authority Airports and Air Passenger Terminals

The following is a description of the airports and air terminal buildings as contained in the record.[6]

1. Kennedy Airport

The Port Authority has operated Kennedy Airport under a lease from the City of New York since June 1, 1947 (Plaintiffs' Statement, ¶ 13 (JA 141)). Situated in the southeast section of Queens County on Jamaica Bay, 15 miles by highway from mid-Manhattan, Kennedy annually serves over 27 million air passengers, and facilitates the transport of over one million tons of air cargo. (*Id.* ¶ 14, 15 (JA 141)). Kennedy contains many installations which support the movement of air passengers and cargo: passenger terminals, runways, taxiways, cargo service buildings, an airmail handling facility, fuel storage facilities, a hotel, administrative buildings, parking lots, car rental lots and others (*Id.* ¶¶ 16, 17, 18 (JA 141, 142)).

The Kennedy passenger terminals are located in the Central Terminal Area. The Kennedy passenger terminals consist of the International Arrivals Building ("IAB"), the East and West Wing buildings extending from the IAB and attached directly thereto, and eight free-standing "unit" terminals. The East and

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The settlement agreement between the Plaintiffs and the airlines provided, *inter alia*, that Plaintiffs would dismiss their lawsuit against the airlines with prejudice (JA 536-37).

Hereinafter, the phrase "air terminals" will refer only to Port Authority controlled areas, the subject of Plaintiffs' remaining claims.

[6] Because of intervening events, the description of the airports set forth below differs somewhat from the airports as they actually exist at the present time. For instance, the record refers to operations of Eastern Airlines, which has ceased operating. The Superintendent respectfully submits, however, that such differences are not material because the characteristics of the airports relied upon by the parties remain essentially the same.

West Wing buildings are leased to a number of foreign flag airlines. The first floor of the IAB contains a federal international inspection services hall for arriving international passengers and a lobby where arriving international passengers are met after clearing customs. The second floor contains patron service outlets such as a snack bar, restaurant, bank, gift shop, postal facility, and currency exchange facilities (Plaintiffs' Statement at ¶ 18 (JA 142); Affidavit of Leif Andersson, dated January 19, 1988 ("Andersson Affidavit"), ¶¶ 4-5 (JA 487)). The Wing buildings are leased to foreign flag carriers to provide flight reservations, ticket sales, passenger accommodations, aircraft boarding, ticket sales, baggage handling, communications, administration and a limited number of patron services (Plaintiffs' Statement, ¶¶ 19-23 (JA 142-44); Andersson Affidavit, ¶¶ 6-9 (JA 487-88)). The IAB is operated by the Port Authority (Plaintiffs' Statement, ¶¶ 18, 19, 24, 112, 114, 120 (JA 142-44, 165-68); Andersson Affidavit, ¶¶ 4-6 (JA 487)). Each of the eight unit terminals at Kennedy is leased by a single foreign or domestic airline. (Plaintiffs' Statement, ¶¶ 24-45 (JA 144)).

2. LaGuardia Airport

Like Kennedy, La Guardia has been operated by the Port Authority under a lease from the City of New York since 1947 (*Id.* ¶ 46 (JA 149)). Situated about eight miles from mid-Manhattan, in northwest Queens County, bordering on Flushing and Bowery Bays, La Guardia annually serves over 22 million passengers. (*Id.* ¶¶ 47, 48 (JA 149)). La Guardia's facilities include two runways, taxiways, a fuel storage facility, aircraft hangars, a police building, a mail facility, an air cargo facility, and garaging, maintenance and food preparation buildings (*Id.* ¶ 49 (JA 149)).

The La Guardia passenger terminal buildings are the Central Terminal Building ("CTB"), the Shuttle terminal, and the Delta/Northwest terminal. (*Id.* ¶¶ 50, 57 (JA 149, 151)). In the CTB, the baggage claim areas on the first floor, and the ticket counter, passenger and baggage check-in, passenger waiting and gate areas on the second floor are leased to airlines (*Id.* ¶¶ 50, 51, 54, 121 (JA 149, 150, 168)). The second floor of the CTB

also contains a central lobby area which is under Port Authority control (*Id.* ¶ 51 (JA 149)). The third floor contains space leased to airlines as airline clubs and airline offices (Superintendent's Statement, ¶ 12 (JA 448)). As at JFK, the unit terminals are leased to individual air carriers. (Plaintiff's Statement, ¶¶ 112, 114 (JA 165-66)).

3. Newark Airport

The Port Authority has operated Newark Airport under a lease from the City of Newark since March 22, 1948 (Plaintiffs' Statement, ¶ 61 (JA 152)). Situated about 16 miles from mid-Manhattan in Essex and Union counties, between the New Jersey Turnpike and U.S. Routes 1 and 9, Newark annually serves over 29 million passengers. (*Id.* ¶ 62, 64 (JA 152)). Newark includes passenger terminals, three runways, taxiways, a hotel, an aviation fuel storage area and fuel distribution system, a central heating and refrigeration plant, a postal facility and utility, and equipment, storage and hangar buildings (*Id.* ¶ 63 (JA 152)).

Newark's passenger terminals are located in two areas. The North Terminal is situated along Brewster Road; Terminals A, B and C are located in the Central Terminal Area (*Id.* ¶ 65 (JA 153)). The North Terminal, which is under Port Authority control, is a one-level building consisting of ticketing and baggage check-in areas, baggage retrieval areas, and patron facilities (*Id.* ¶ 66 (JA 153)). Terminals A and B each have a main terminal and three "satellite" buildings containing aircraft gate areas. Each main terminal has an upper departures level with facilities for airline ticketing and baggage check-in, and a lower arrivals level with airline baggage claim and ground transportation facilities (*Id.* ¶ 67 (JA 153)). These areas are leased by the respective airlines using them (*Id.* ¶ 122 (JA 168)). The concourse level, located halfway between the upper and lower levels of each terminal building, is leased in common by the airline tenants of each terminal. This level is used to provide passenger circulation space and passenger services, and contains eating facilities, retail stores and other patron services (*Id.* ¶¶ 68, 122 (JA 153-54, 168)).

C. The Purpose and Characteristics of the Port Authority Airports

The sole purpose of all three of the Port Authority airports is the facilitation of air transportation. (Superintendent's Statement, ¶¶ 39, 40 (JA 453)). All planning and operational decisions that are made with regard to the Port Authority air terminals are directly or indirectly related to effectuating the safe, efficient and convenient movement of departing and arriving passengers to and from aircraft (*Id.* ¶ 41 (JA 454)). Decisions regarding the number and location of boarding gates, placement of ticket counters, the provision of passenger information, and the number and types of consumer services at Port Authority airports all have as their goal assisting the air passenger in reaching his or her destination as quickly and conveniently as possible, and making any time spent in the terminal as pleasant as possible (*Id.* ¶ 42 (JA 454)).

The specialized purpose of the Port Authority air terminal buildings is reflected in all of their characteristics - design, usage, congestion problems, location, presence of captive audiences, financing and security concerns.

1. Design and Usage

The chief facilities of the terminals are ticket counters, passenger and baggage check-in facilities, passenger waiting areas, baggage claim areas, car rental and ground transportation desks, airline clubs and offices, and customs and immigration facilities (Plaintiffs' Statement, ¶¶ 7, 8, 18, 19, 25-31, 33-41, 43, 44-45, 52, 54-56, 58-60, 66, 70 (JA 139-40, 142-43, 144-45, 146-49, 150-52, 153, 154)).

The air terminal concourses are designed to facilitate the movement of departing passengers and their baggage to their ticketing/check-in facilities, and to their boarding gates and into their airplanes; the air terminal concourses are also designed to facilitate the movement of arriving air passengers out of their airplanes, into the terminals, to the baggage claim area and into

ground transportation vehicles. Concourses are designed to permit the quickest possible movement from the point of the passenger's arrival at the airport, by ground or air, to his or her point of departure (Superintendent's Statement, ¶ 47 (JA 455); Andersson Affidavit, ¶¶ 7-8 (JA 488)).

The air terminal concourses are not used as thoroughfares to or from destinations within the surrounding communities, nor as gathering places for community activities (Superintendent's Statement, ¶ 62 (JA 458)). Virtually all of the persons in the Port Authority airport terminals are passengers, "meeters and greeters", or employees of airlines, of airline contractors, of the Port Authority, of the federal inspection services, or other airport-related businesses or enterprises for travel-related purposes (*Id.* ¶ 63 (JA 458)). Air travel passengers comprise 80% of the persons in the airport terminals, "meeters and greeters" comprise 15%, and employees of airlines and other airport-related businesses comprise 5% (*Id.* ¶ 64 (JA 459)).

2. Congestion

Airport pedestrian congestion is the single greatest problem at Port Authority airports (*Id.* ¶ 49 (JA 456)). A pedestrian delay of minutes or even seconds can cause a traveler to incur substantial loss in travel time, and possibly additional costs, because of a missed plane (*Id.* ¶ 48 (JA 455)). Pedestrian routes in airports are heavily congested during peak travel hours, and the timing and duration of these peak periods are subject to considerable fluctuation because of weather conditions, mechanical difficulties in aircraft, airline hubbing activities and other factors (*Id.* ¶ 52 (JA 456)).

Many concourses in the existing terminals at the airports were designed before the development and use of wide body aircraft. These terminals are overloaded with pedestrians during peak hours. The introduction of, and increase in use of, large capacity aircraft have resulted in a continuing and growing pedestrian congestion problem (*Id.* ¶¶ 50, 51, 53-55 (JA 456-57)).

Airport congestion has caused the Port Authority to plan extensive capital alterations to its airports. The purpose of the

planned capital improvements to Port Authority airports is to reduce landside congestion and facilitate pedestrian movement within the passenger terminals at the Port Authority airports (*Id.* ¶¶ 56-57 (JA 457-58)). Planned capital improvements include construction of new terminals, reconfiguration of existing terminals, expansion of airport roadways, and development of ancillary facilities such as inter-terminal people movers and baggage handling systems (Plaintiffs' Statement, ¶¶ 84-89 (JA 158-60)).

3. **Location**

Each of the Port Authority's airports is isolated from the surrounding community. Access to each airport is provided by highways which serve as physical barriers to pedestrian access (Plaintiffs' Statement, ¶ 12 (JA 140); Superintendent's Statement, ¶ 61 (JA 458)).

4. **Captive Audiences**

The Port Authority air terminals contain "captive audiences" at virtually every location. Persons waiting in an airline terminal for an airplane to arrive or leave normally remain in a specific waiting area. Persons waiting to purchase airline tickets, to pick up baggage, to make car rental or other ground transportation arrangements, to go through security checks, at telephones, and at eating concessions, tend to remain in the area in which they are located to complete their transaction (Superintendent's Statement, ¶¶ 58-60 (JA 458); Andersson Affidavit, ¶ 9 (JA 488)).

5. **Financing**

The Port Authority airports are financed by user fees, not by the general tax revenues of any state, county or city. These user fees are rentals paid by airline tenants, landing, terminal and ramp gate fees paid by individuals and corporations for use of the airports by itinerant and lessee aircraft, fees paid by ground transportation providers (such as auto rental agencies and limousine services), fees paid by providers of other passenger services (such as restaurants and shops), and fees paid directly by

air passengers (such as parking lot fees) (Superintendent's Statement, ¶ 43 (JA 454)). Even the limited portion of airport capital funds received from the federal government are grant monies derived from airport user fees pursuant to the relevant statutes in Titles 26 and 49 of the United States Code (*Id.* ¶ 46 (JA 455)).

6. **Security**

Airports, including the Port Authority airports, have special security concerns. The history of skyjacking and other forms of terrorism at airports, including the 1975 bombing that caused death and injury at La Guardia, necessitates the maintenance of security precautions found in few places in our society, including the mandatory screening of air passengers, as required by Parts 107, 108, 109 and 129 of Title 14 of the Code of Federal Regulations (Superintendent's Statement, ¶ 65 (JA 459)). In addition, the Court is requested to take judicial notice of the heightened security precautions taken at airports during the recent operation "Desert Storm".

D. The Port Authority Regulations At Issue

The regulations relevant to this action are set forth in the Port Authority's Airport Rules and Regulations, at Part B of Chapter III, as amended, which became effective March 3, 1988 (Sloane Supplemental Affidavit, ¶¶ 8-9 (JA 513-14)).

Part B addresses non-commercial activity at Port Authority airport terminal space which is not occupied by a lessee, licensee or permittee (*Id.* ¶ 9(a) (JA 513)). Section 1 is applicable to the interior areas of buildings and regulates certain conduct addressed to passersby in a continuous or repetitive manner. Section 1(b)-(c) prohibits the continuous and repetitive distribution of literature to, and solicitation of money from, passersby. Section 1 does not prohibit private, one-on-one, or individualized religious or secular activity inside or outside of an airport terminal building.

Section 2 addresses conduct both within and without air terminal buildings. Section 2 does not prohibit solicitation and

distribution of literature on sidewalks outside terminal buildings provided that such activity does not interfere with airport operations as set forth in Section 2(b) (*Id.* ¶ 9(c) (JA 514)).

The purpose of Sections 1(b)-(c) and 2(b) is to restrict activity which is inconsistent with the purpose of the Port Authority air terminals – the facilitation of air travel – and which has the effects of contributing to the problems of air terminal pedestrian congestion and airport security, the annoyance of airport patrons who are a captive audience, diverting revenue from the airport, and defrauding airport patrons (*Id.* ¶ 10 (JA 514)). By restricting solicitation and distribution of literature to sidewalk areas, Port Authority officials are able to closely monitor such activity by Plaintiffs and others to identify conduct that violates the law or interferes with airport operations. The experience of the Port Authority and others clearly demonstrates the need for such monitoring (*Id.* ¶ 13 (JA 515); Affidavit of Philip Le B. Douglas, sworn to on October 12, 1984 ("Douglas Affidavit"), ¶¶ 17, 18, 22-25 (JA 78-80, 81-84)).

Analysis of the most recent survey of air passengers using the Port Authority airport terminal buildings demonstrates that at least 97% of the passengers in airport terminal buildings use the sidewalks outside such buildings for ingress or egress, and therefore, are exposed to solicitation and distribution of literature under the Port Authority regulations at issue. (Supplemental Affidavit of Frederick V. Hurst, Jr., sworn to on April 22, 1988 ("Hurst Supplemental Affidavit"), ¶ 15 (JA 530-31)).

E. Opinions Below

1. District Court Opinion

The District Court granted Plaintiffs' motion for summary judgment and enjoined the Superintendent from enforcing regulations prohibiting the continuous and repetitive solicitation of contributions and distribution of literature inside the air terminals on the ground that the regulations violated the First Amendment.

The District Court held that the standard to be applied in judging the validity of the Port Authority's regulations is this Court's now familiar public forum analysis contained in *Perry*

Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) and subsequent cases.

The District Court noted that "[i]t is now well settled that streets, parks and sidewalks are traditional public fora[,]" (PA 38) and, that designated public fora are places "which the 'State has [intentionally] opened for use by the public as a place for expressive activity.'" (PA 38) The District Court held that the air terminals were traditional public fora because they possessed the characteristics of a "bustling metropolitan boulevard" (PA 40).

The court rejected the Superintendent's contention that public streets and parks are unique species of public property (PA 41). The court also rejected the Superintendent's argument that the sole purpose of airport terminals as facilitators of air transportation and the attendant characteristics of airport terminals – including their design, usage, conditions of congestion, presence of captive audiences, isolation from surrounding communities, financing and security concerns – distinguish airport terminals from city streets. According to the District Court, such purpose and characteristics do not take airports out of the traditional public forum classification, and, to the extent that First Amendment activity would interfere with airport operations, such issues should be addressed in time, place and manner restrictions (PA 43-47).

2. The Court of Appeals Opinion

The Court of Appeals reversed in part and affirmed in part, the judgment below, holding that the Port Authority rules at issue were valid insofar as they prohibited solicitation, but were invalid insofar as they prohibited the distribution of literature, within the air terminals.

After reviewing the facts of this case and public forum analysis in general (PA 1-9), the Court of Appeals declared that "the sole issue on appeal . . . is whether the terminal areas are traditional public fora for protected speech." (PA 10). The Second Circuit then stated that prior to this Court's decision in *United States v. Kokinda*, __ U.S. __, 110 S. Ct. 3115 (1990), it would

have classified the air terminals as public fora because the established authority in other circuits had classified airports as pubic fora, and the court was reluctant to create a conflict when the view of other circuit courts was not unreasonable. However, the court below continued: "*Kokinda*[ ] has altered public forum analysis and . . . we would not be faithful to Supreme Court precedent if we were to follow the other circuits." (PA 10-11).

Under the Second Circuit's analysis, *Kokinda* upheld the prohibition of solicitation on the post office walkway based upon two separate rationales. First, in the plurality opinion written by Justice O'Connor, the prohibition was valid because the walkway was a nonpublic forum since it "was not a public passageway designed 'to facilitate the daily commerce and life of the neighborhood or city' but was intended 'solely to assist postal patrons' to get access to postal services. [110 S. Ct.] at 3120." (PA 11). And, second, in the concurring opinion of Justice Kennedy, the prohibition was valid because solicitation was sufficiently disruptive conduct so that it could be banned irrespective of whether the walkway was a public forum (PA 12).

The Court of Appeals held that the passageways in the Port Authority's air terminals are similar to the walkway in *Kokinda*. Both the airport terminals' passageways and the post office walkway are intended solely to facilitate a particular class of transactions – air travel in the case of the airport terminal passageways, and postal activities in the case of the post office walkways. As with post office walkways, people do not use the passageways in air terminals to meet friends for lunch, window-shop, take the air, or engage in any of the other purposes for which city streets are used. The passageways are used solely for air-related purposes by travelers, persons connected with air travelers, or employees of businesses serving air travelers (PA 12, 13). The similar physical appearance of the airport passageways and city streets was held to be of no moment in view of the special purpose of the airport (PA 13).

Furthermore, the majority stated, the Port Authority's anti-solicitation restriction served precisely the same purpose as the restriction upheld in *Kokinda*. Like the Postal Service in *Kokinda*,

the Port Authority has an interest in protecting its airport patrons from the disruption of in-person solicitation (PA 13-14). In fact, the Court of Appeals held that solicitation would have a greater disruptive effect in the Port Authority's air terminals than in a post office walkway because of the nature of the air terminals:

> "The Port Authority's concern over disruption of the air-traveling public is justified on the present record. That record establishes that pedestrian congestion is one of the greatest problems facing the three terminals. Much of the facilities in question was built before wide-body aircraft, and a pressing need for expansion exists. Air travelers, who are often weighted down by cumbersome baggage and may be hurrying to catch a plane or to arrange ground transportation, will find in-person solicitation even more disruptive than did the postal patrons in *Kokinda*." (PA 14).

Although the Court of Appeals upheld the validity of the ban on solicitation, the Court of Appeals reached a different conclusion with respect to the ban on the distribution of literature inside the air terminals. Relying upon Justice Kennedy's characterization of solicitation as a far more disruptive activity than leafleting, the Second Circuit held, without further reasoning, that the Port Authority's ban on leafleting in the air terminals violated the First Amendment (PA 14-15).

Chief Judge Oakes dissented, stating that in his view the air terminals were public fora. According to the dissent, *Kokinda* did not announce a new rule under which a site's public forum status was dependent upon its purpose (PA 17-20). In Chief Judge Oakes' view, a number of factors, especially airport passageways' similarity to public streets, caused the airport terminals to have the status of public fora (PA 21).

Finally, Chief Judge Oakes noted that, in his view, there is no distinction between the distribution of literature and solicitation since "[b]oth involve the same congestion [and] irritation" (PA 28).

SUMMARY OF ARGUMENT

The Port Authority air terminals are not traditional public fora because their purpose is the facilitation of air travel, not public assembly or debate. The Court of Appeals and the District Court both recognize that the air terminals have this purpose and even plaintiffs admit that the air terminals were created to facilitate air travel.

The Port Authority air terminals' purpose of facilitating air travel is reflected in all of their characteristics, including design, usage, unique congestion problems, lack of integration with neighboring communities, presence of captive audiences, financing and security concerns. All airport terminal functions and services are related to air travel and virtually all persons at Port Authority air terminals are there for air travel purposes.

The Port Authority air terminals clearly differ from traditional public fora. The essential nature of a street or park is that it be open to the public for general use. In contrast, the Port Authority air terminals would retain their essential nature even if access were restricted to only passengers and air travel employees. In addition, the Port Authority air terminals are physically separated from the surrounding communities. Thus, unlike streets, the air terminals do not serve as necessary conduits in the daily affairs of a locality's citizens.

The Port Authority air terminals' purpose of facilitating air travel requires the movement of passengers to departing aircraft and from arriving aircraft in limited periods of time, thereby creating extreme congestion problems and captive audiences, which highlight the specialized purpose of these sites. In addition, the specialized purpose of air terminals is reflected in their unique security concerns. The security precautions continuously taken in airports are taken in few other places in our society, and certainly not on streets or in parks.

It is also clear that Plaintiffs' reliance on lower court decisions holding that air terminals are public fora is misplaced. These decisions erroneously rely on factors which this Court has repeatedly held are not determinative of public forum status:

physical resemblance to streets, unrestricted access and usefulness for expressive activity. If these factors determined the public forum status of government property, then virtually every government building, including courthouses, would be a public forum for expressive activity.

Since the Port Authority air terminals have as their specific purpose the facilitation of air travel and not public assembly or debate, the restrictions challenged by Plaintiffs should be judged by the standards applicable to nonpublic fora. Under public forum analysis, a restriction on expressive activity in a nonpublic forum is valid if the regulation is viewpoint neutral and is reasonable. The Port Authority restrictions easily meet this test.

First, the Port Authority regulations are clearly viewpoint neutral since the advocacy of any one position is not favored over the advocacy of any other position. Second, the Port Authority regulations are also clearly reasonable since they further the Port Authority's legitimate managerial interest in controlling problems of congestion, security, fraud and protecting captive audiences, and, moreover, they restrict only the most disruptive expressive activity.

Even if the Port Authority air terminals were public fora, the regulations at issue would still be valid because they are content-neutral, reasonable, narrowly tailored to achieve significant government interests and leave open ample alternate means of communication. The regulations are content neutral since they restrict all repetitive solicitation and distribution of literature regardless of content. The regulations are reasonable in light of the Port Authority's managerial interests identified above. The regulations are narrowly tailored since they address only the two types of expression, solicitation and distribution of literature, which have the greatest adverse impact on air passengers. Finally, the regulations leave open ample alternative means of communication since they permit solicitation and the distribution of literature on the sidewalks which are used for ingress and egress by virtually everyone who uses the air terminals.

ARGUMENT

POINT I

UNDER PUBLIC FORUM ANALYSIS, THE PORT AUTHORITY AIR TERMINALS ARE NOT TRADITIONAL PUBLIC FORA BECAUSE THEIR PURPOSE IS THE FACILITATION OF AIR TRAVEL, NOT PUBLIC ASSEMBLY AND DEBATE.

A. Public Forum Analysis Is Applicable To The Instant Case.

At issue in the instant case are the conflicting managerial interest of the Port Authority to preserve its air terminals for the air travel use to which they are lawfully dedicated and the interest of the plaintiffs to solicit and distribute literature in such terminals. Public forum analysis is the method this Court has developed to resolve such disputes.

Since the 1974 decision in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), this Court has relied upon public forum analysis to decide cases in which persons have sought to use government property for expressive activity in violation of rules which restrict or prohibit such activity. *See United States v. Kokinda*, __ U.S. __, 110 S. Ct. 3115, 3119 (1990).

In 1983, in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), this Court for the first time set forth a comprehensive analytical model for determining the extent to which a government agency must permit expressive activity in a publicly-owned facility. The model differentiates among a traditional public forum, a designated public forum, and a nonpublic forum. *Id.* at 45-46. Under the *Perry* model, a government may not constitutionally prohibit expressive activity in a traditional public forum or a designated public forum[7] unless

[7] Plaintiffs do not argue that the Port Authority airports are designated public fora (PA 39). Moreover, any such claim would have to be rejected out of hand

(Footnote continued)

the prohibition is content-neutral or necessary to serve a compelling government interest. Even if content-neutral, the regulation is valid only if it is reasonable, narrowly tailored to achieve a significant governmental interest and leaves open ample alternative means of communication. In contrast, in a nonpublic forum, any reasonable restriction affecting expressive activity that preserves the forum for its "intended purposes" is fully constitutional as long as it does not discriminate against expressions of a particular viewpoint. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 800, 806 (1985); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 46, 49.

The public forum analysis consistently used by this Court correctly balances both the interests of those seeking to use a place for expressive activities and the essential governmental interest in preserving government property for its intended purpose. As held by this Court,

> "'The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'" *Greer v. Spock*, 424 U.S. 824, 836 (1976), *quoting Adderley v. Florida*, 385 U.S. 39, 47 (1966).

Finally, the use of public forum analysis is far superior to an *ad hoc* balancing of interests because public forum analysis provides the stability "essential for a reasonably well-ordered and coherently administrable legal system." Saphire, *Reconsidering the Public Forum Doctrine*, 59 U. Cin. L. Rev. 739, 754-55 (1991).

since a designated public forum only exists when a government intentionally opens a place or means of communication for public discourse. Government inaction or government permission of limited discourse does not suffice. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 802 (1985). The record clearly demonstrates that the Port Authority airport terminals have not been "intentionally designated" as a public forum (JA 154-56, 473-74, 512-13).

> "Whether from the perspective of the government official concerned with determining the permissibility of contemplated regulations, or from the perspective of the citizen concerned with planning his or her affairs, the fluid and ambiguous nature of unstructured judicial interest balancing undercuts the interests in prediction and reliance." *Id.*, at 755 (note omitted).

B. The Port Authority Air Terminals Are Not Traditional Public Fora Because Their Sole Purpose Is The Facilitation Of Air Travel.

This Court has held that a site owned by the government is a traditional public forum only if it is among "those places which 'by long tradition or by government fiat have been devoted to assembly and debate.'" *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. at 802, *quoting, Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 45. This description hearkens back to the often-quoted passage from *Hague v. C.I.O.*, 307 U.S. 496 (1939):

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Id.* at 515.

As the quotation from *Hague* suggests, public streets and parks are traditional public fora because service as a central gathering place for the communication of ideas is inherent in their nature.[8]

[8] A college campus has been described as possessing "many of the characteristics of a traditional public forum" for its students, *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. at 803, *citing Widmar v. Vincent*, 454 U.S. 263 (1981), because a college campus serves as a "marketplace of ideas." *Widmar v. Vincent*, 454 U.S. at 267 n.5 (citations omitted).

See United States v. Kokinda, 110 S. Ct. at 3128 (Brennan, J., dissenting); *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

Although this Court has never ruled upon the public forum status of an airport terminal,[9] the application of public forum analysis to the instant case makes it evident that the Port Authority air terminals are not public fora. The sole purpose of the air terminals is the facilitation of air travel, not "assembly and debate," either by "long tradition" or "government fiat." *See Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. at 802; *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 45.[10] Significantly, both the District Court and the Court of Appeals below agreed that the purpose of the Port Authority airports is the facilitation of air travel (PA 5, 13, 14, 43, 47).[11] In fact, even Plaintiffs concede that "airports were created to facilitate air travel." *See* Plaintiff's Brief, at 47.

[9] The public forum status of an airport was presented to the Court in *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), but the Court did not reach the issue. The Los Angeles International Airport regulation at issue was held to be invalid because the regulation was so broad that it could be interpreted as prohibiting even the reading of a newspaper. *Id.* at 573-74. One of the issues upon which *certiorari* was granted was the public forum status of the airport. *Id.* at 577 (White J., concurring, joined by the Chief Justice); *Summary of Orders*, 55 U.S.L.W. 3197 (1986)(questions raised on petition). The concurring opinion specifically suggested that

> "the Court's opinion . . . should not be taken as indicating that a majority of the Court considers the Los Angeles International Airport to be a traditional public forum." *Id.* at 577 (Justice White, concurring, joined by Chief Justice Rehnquist).

[10] Plaintiffs' reference to the Federal Aviation Authority's ("FAA's") statements as an airport proprietor regarding the public forum status of National and Dulles Airports are irrelevant since those statements are inconsistent with the record in this case. Moreover, the brief *amicus curiae* submitted by the Airports Association Council International - North America demonstrates that the FAA's view is overwhelmingly a minority one among airport operators.

[11] Although the District Court did not find that the purpose of the airports rendered the air terminals to be nonpublic fora, the District Court did not reject the contention that air travel is the purpose of the airports (PA 47).

The Port Authority airports' sole purpose of facilitating air travel is reflected in all of their characteristics - planning, operation, design, usage, financing, lack of integration with neighboring communities, presence of captive audiences, and unique congestion and security problems. These characteristics both attest to the special purpose of the Port Authority air terminals and distinguish them from traditional public fora. In previous cases, this Court has examined the nature of alleged public fora to determine their public forum status. *See, e.g., United States v. Kokinda, supra; Greer v. Spock, supra; Lehman v. City of Shaker Heights, supra.*

1. **Design and Usage**

It is undisputed in the record in this case that "all planning and operational decisions that are made with regard to the Port Authority airport terminals are directly or indirectly related to effectuating the safe, efficient and convenient movement of departing and arriving passengers to and from aircraft"[12] (Superintendent's Statement, ¶ 41 (JA 454)).

Significantly, virtually all of the persons in the airport terminals are there for an air travel purpose, as travelers, meeters and greeters, or airport-related employees. (Superintendent's Statement, ¶ 63-64 (JA 458-59)). As the Court of Appeals stated,

> "Persons using the passageways in terminals are not there primarily to meet a friend for lunch, window-

[12] This sole purpose of facilitating air travel is not unique to the Port Authority airports. Such purpose is acknowledged in the general literature on airports, including works relied upon by Plaintiffs. *See* International Air Transport Ass'n, *Airport Terminals Reference Manual*, §§3.1.1., 3.4.1.1., 3.4.3 (7th ed. 1989) (hereinafter "IATA Manual"); N. Ashford & P.H. Wright, *Airport Engineering*, 221-22 (2d ed. 1984); N. Ashford, H.P.M. Stanton & C. Moore, *Airport Operations*, 5-7, 203-09 (1984); R. Horonjeff & F.X. McKelvey, *Planning & Design of Airports*, 325-27 (3d ed. 1983); A.T. Wells, *Airport Planning and Management*, 157 (1986) (hereinafter "Wells"); P.H. Wright & N.J. Ashford, *Transportation Engineering*, 620-21 (3d ed. 1989).

> shop, take the air, or engage in any of the multitude of other purposes for which typical downtown streets are used. *They are solely there as air travelers, persons connected with air travelers, or employees of businesses serving air travelers.*" (PA 13) (emphasis added).[13]

Hence, the Port Authority air terminals are completely

> "[u]nlike the public street described in *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S.Ct. 2559, 69 L. Ed. 2d 298 (1981), which was 'continually open, often uncongested, and constitute[d] not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people [could] enjoy the open air or the company of friends and neighbors in a relaxed environment,' *id.* at 651, 101 S. Ct., at 2566, . . ." *United States v. Kokinda*, 110 S. Ct. at 3120 (square brackets in original).

Consequently, whereas streets and parks "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions", *Hague v. C.I.O.*, 307 U.S. at 515, it is undisputed that persons use Port Authority airports only for travel-related purposes.[14]

[13] As stated in one work cited by Plaintiffs:

> "When focusing on the needs of the airline passenger in the airport environment, it is necessary to consider the fact that none of the ultimate users of the airport really wish to be there; they are in the airport only for the purpose of getting somewhere else. It has been demonstrated that passengers are normally under fairly high emotional stress in the airport environment and, as such, have needs that are unique to that situation." Doughty, *Review of Passenger Service Issues at Airports*, 7, in *Airports For People: Proceedings of the 8th World Conference Organized by the Institution of Civil Engineers* (1988) (hereinafter "Doughty").

[14] The Port Authority air terminals are not atypical in this regard. Indeed, the most recent source relied upon by Plaintiffs regarding airport concessions

(Footnote continued)

Finally, the Port Authority air terminals and the traditional public fora of parks, streets, and sidewalks differ in their *essential nature*:

> "Public parks, streets, and sidewalks are public forums because open access by all members of the public is integral to their function as central gathering places and arteries of transportation. Public access is not a matter of grace by government officials but rather is inherent in the open nature of the locations." *See United States v. Kokinda*, 110 S. Ct. at 3128 (Brennan, J., dissenting).

In contrast, open access to all members of the public is not inherent in the nature of, nor integral to the function of, air terminals, which do not serve as central gathering places. Clearly, unlike streets, the Port Authority air terminals would retain their essential nature and function even if access were granted only to ticketed airline passengers and air travel employees, and the air terminals were used only for the boarding and deboarding of aircraft.

2. Congestion

At an airport terminal, unlike at a street or a park, a pedestrian delay of minutes or even seconds could very well cause a loss of hours in total travel time because of a missed plane (Superintendent's Statement, ¶ 48 (JA 455)). *See* IATA Manual, *supra* note 12, §§3.1.1, 3.3.2.2, 3.3.2.3, 3.4.1.1, 3.4.3; W. Hart, *The Airport Passenger Terminal*, 17-18 (1985); A.T. Wells, *Airport Planning and Management*, *supra*, at 140, 142, 157; P.H. Wright & N.J. Ashford, *Transportation Engineering*, 620 (3d ed. 1989).

The Port Authority airport terminal pedestrian routes are especially congested during peak travel hours, whose timing and

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describe the air terminal population as consisting *only* of the same travel related groups identified as visitors to the Port Authority air terminals: Travelers, "meeters and greeters" and airline/airport employees. Weinstein and Madrigal, *Airport Customers and Their Needs for the 1990's*, Airport Services, May/June 1991, 18-20 (hereinafter "Weinstein").

duration are subject to considerable fluctuation as to time and length (Superintendent's Statement at ¶ 52 (JA 456)). And, the congestion problems in many concourses in the Port Authority air terminals have been made worse by the introduction of, and increase in use of, large capacity aircraft (Superintendent's Statement, ¶¶ 50, 51, 53-55 (JA 456-57)). As the Court of Appeals stated, airport concourses are "among society's choke-points" and the "record establishes that pedestrian congestion is one of the greatest problems facing the three terminals." (PA 14)

The Port Authority's congestion problems are shared by other major United States airports. Congestion at peak periods subject to unpredictable fluctuation is common at other airports. *See generally*, Office of Technology Assessment, Congress, *Airport System Development*, 48-49 (1984). A senior research advisor of the Transportation Research Board has observed that "[s]ome airports are exceeding capacity almost on a daily basis." Lemer, *Airport Landside Capacity: A Growing Concern*, T.R. News, May/June 1986, 2, 5. Moreover, congestion at major airports is getting worse. In the words of the Congressional Budget Office,

> "Crowding has thus emerged as the major airports' number-one problem, and the FAA anticipates worsening of airport congestion in coming years." Congressional Budget Office, *Financing U.S. Airports in the 1980's*, xix (1984).

And the Federal Aviation Administration has estimated that between the years 1984 and 2000 the annual number of passengers using the nation's airports will increase by more than 70%, and will result in the nation's airports being "swamped". *Id.*, at 3.

3. Location

The location of the Port Authority air terminals clearly distinguishes them from traditional public fora. All three airports are separated from the city streets of nearby communities by ribbons of highways (Plaintiffs' Statement, ¶ 12 (JA 140);

Superintendent's Statement, ¶ 61 (JA 458)).[15] Because of the segregation of air terminals from surrounding communities, air terminals, unlike public streets, do not serve as "a necessary conduit in the daily affairs of a locality's citizens". *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981).[16]

This physical segregation from surrounding communities makes the Port Authority air terminals dissimilar to the streets surrounding this Court held to be a public forum in *United States v. Grace*, 461 U.S. 171 (1983),[17] and similar to the streets of the military base held to be a nonpublic forum in *Greer v. Spock*, *supra*. In *Grace*, this Court held that the sidewalks on the perimeter of the Supreme Court Building grounds were a public forum because they were indistinguishable from other Washington, D.C. sidewalks. More specifically, the Court stated that,

> "There is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave." *Id.* at 180.

Greer, however, upheld the exclusion of leafleting from the Fort Dix Military Reservation in New Jersey because the streets of Fort Dix were not integrated into the streets of any surrounding community. *Greer v. Spock*, 424 U.S. at 835-36. The Port Authority air terminals are like the streets involved in *Greer* since, because of their location, they are not used in the daily life of surrounding communities.

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[15] This physical segregation is emphasized by the phenonenom of "fly-in" campaigning described by Plaintiffs. Candidates "fly-in" and then "fly-out" because it requires too much effort to travel between an airport and the community the airport serves. *See* Shapiro, *Hello, I Must Be Going*, Time, March 7, 1988, 20.

[16] Hereinafter, "ISKCON" will refer to "International Society for Krishna Consciousness, Inc." or similarly named parties.

[17] *See Pearson v. United States*, 581 A.2d 347, 353 (D.C. App. 1990), *cert. denied*, __ U.S. __, 112 S. Ct. 51 (1991) (Supreme Court grounds other than surrounding sidewalk are not a public forum).

4. Captive Audiences

The presence of captive audiences in air terminals distinguish such terminals from the traditional public fora of streets and parks. Captive audiences exist throughout the air terminals – at enplaning and deplaning points, at ticket counters, security checkpoints, baggage conveyor belts, and car rental and other ground transportation counters. At all of these locations, travelers tend to remain in place in order to complete travel-related tasks (Superintendent's Statement, ¶¶ 58-60 (JA 458); Andersson Affidavit, ¶ 9 (JA 488)). *See* Doughty, *supra* note 13, at 7. As noted by Justice Douglas with regard to the patrons of public transportation vehicles, the rights of such captive audiences "to be free from forced intrusions on their privacy" would be violated if they were forced to be the object of uninvited persuasion. *Lehman v. City of Shaker Heights*, 418 U.S., at 307 (1974) (Douglas, J., concurring); *cf., Consolidated Edison Company of New York, Inc. v. Public Service Comm'n*, 447 U.S. 530, 542 (1980).

5. Financing

The Port Authority airports' financing differentiates them from traditional public fora. Streets and parks generally are financed from general tax funds, reflecting their service to the public at large. In contrast, the Port Authority airports are financed by user fees paid by the airlines, concessionaires, air passengers[18] and general aviation (Superintendent's Statement, ¶ 43 (JA 454)).[19]

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[18] Prior to the enactment of the Aviation Safety and Capacity Expansion Act of 1990, an airport operator could lawfully impose fees on airline passengers only for the use of ancillary services such as parking lots, but not for the use of the airport generally. *See* 49 U.S.C. app. §1513(a) (1988). The legislation enacted in 1990 authorizes, under certain restrictions, airport operators to impose user fees directly on air passengers, to finance airport capital improvements. Aviation Safety and Capacity Expansion Act of 1990, §9110, 49 U.S.C.A. app. §1513(a),(e) (Supp. 1991).

[19] The Port Authority airports are typical of the national model. In a 1987 report to Congress, the Secretary of Transportation observed that virtually all airport funding comes from airport-user sources. U.S. Department of Transportation, *National Plan of Integrated Airport Systems 1986-1995*, 17 (1987).

Even the small amount of federal grant money received by the Port Authority for airport capital improvements is derived from user fees collected from air passengers via an airline ticket excise tax, and from transporters of property by air via an air-bill excise tax (*Id.*, ¶ 46 (JA 455)). Internal Revenue Code of 1954, §§4261-62, 4271-72 *as amended*, 26 U.S.C. §§4261-62, 4271-72 (1988 & Supp. I 1989). Significantly, an explicit statutory requirement for the receipt of federal aid is that an airport be self-supporting to the greatest extent possible. Airport and Airway Improvement Act of 1982, *as amended*, §511(a)(9), 49 U.S.C. app. §2210(a)(9) (1988).

The self-sustaining nature of the Port Authority airports is a characteristic they share in common with the postal facilities examined in *United States v. Kokinda*, *supra*. The plurality opinion observed that the Postal Service was intended by Congress to be run more like a business than its predecessor, the Post Office Department, in that Congress directed the Postal Service to become a self-sustaining entity. 110 S. Ct. at 3122.

6. Security

The well-known history of skyjacking and other forms of terrorism at airports, including the 1975 bombing at LaGuardia Airport, has resulted in the adoption of equally as well-known security precautions in air terminals (Superintendent's Statement, ¶ 65 (JA 459)). Thus, air terminal design now includes security requirements as a basic consideration. *See* IATA Manual, *supra* note 12, §3.3.6. Indeed, security precautions of a nature which need to be taken at few other locations in our society *must* be taken at air terminals under the mandate of federal law. The Air Transportation Security Act of 1974 required the Secretary of Transportation to issue regulations for the mandatory screening of air passengers using international, interstate and intrastate flights. Air Transportation Security Act of 1974, §202, *as amended*, 49 U.S.C. app. §§1356, 1357 (1988). The air security regulations currently in effect impose security obligations on airport operators (14 C.F.R., Part 107 (1991)), airline operators (*id.* Part 108, Part 129), and indirect air carriers such as freight forwarders (*id.* Part 109).

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In sum, Port Authority air terminals are not public fora because their sole purpose is the facilitation of safe, efficient and convenient air travel, *not* public assembly and debate. The special purpose of airports is reflected in all of their characteristics such as planning, operation, design, usage, unique congestion problems, location, presence of captive audiences, financing and security problems.

C. Plaintiffs And The Lower Court Precedent Upon Which They Rely Ignore Public Forum Analysis Principles Which Make It Clear That A Site Is Not A Public Forum Because Of A Physical Resemblance To A City Street, Unrestricted Access Or Usefulness For Expressive Activity.

Plaintiffs' Brief virtually ignores the public forum analysis principles enunciated by this Court. Instead, Plaintiffs rely on lower court precedents that have classified airports as traditional public fora merely because of the alleged physical resemblance of air terminal concourses to city streets, because access to the terminals is unrestricted and/or because the terminals would be useful to Plaintiffs as a site for solicitation and distribution of literature. Under the decisions of this Court, it is clear that none of these factors either separately or together render a site a public forum.

This Court has made it clear that a place is not a public forum merely because it resembles a city street. *See United States v. Kokinda*, 110 S. Ct. at 3121; *Frisby v. Schultz*, 487 U.S. at 479. Thus, in *Greer v. Spock*, *supra*, this Court rejected the claim that a street or sidewalk on a military base open to the public was a public forum because of its physical resemblance to a city street or sidewalk. Rather, the Court held that such streets were not public fora because they are different in purpose from a city street. 424 U.S. at 835-37. Similarly, in *Kokinda*, a plurality of this Court classified a walkway to a post office as a nonpublic forum despite its physical similarity to a city sidewalk because of its specialized purpose:

> "The postal sidewalk was constructed solely to assist postal patrons to negotiate the space between the

> parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city." 110 S.Ct. at 3120.

Thus, even if air terminals have some physical resemblance to city streets, this does not make them public fora.

In addition, it is beyond dispute that unrestricted access to a site does not render a site a public forum. *United States v. Kokinda*, 110 S.Ct. at 3119; *Greer v. Spock*, 424 U.S. at 836, *quoting Adderley v. Florida*, 385 U.S. at 47. If it did, then every government facility open to the public, from courthouses to libraries to office buildings, would be a public forum.

This Court has explicitly stated that a public forum does not exist merely because persons are freely permitted to enter a government owned site. Indeed, the Court has

> " . . . expressly rejected the suggestion that 'whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a "public forum" for purposes of the First Amendment.'" *United States v. Albertini*, 472 U.S. 675, 686 (1985) *quoting Greer v. Spock*, 424 U.S. at 836; *see also, United States v. Grace*, 461 U.S. at 177.

In *Greer v. Spock*, *supra*, this Court held that the Fort Dix Military reservation was not a public forum despite the fact that members of the public were freely permitted to enter the facility and did so. *See* 424 U.S. at 830, 837. The open character of Fort Dix was made clear in the description of the facility set forth in Justice Brennan's dissent:

> "No entrance to [Fort Dix] is manned by a sentry or blocked by any barrier. The reservation is crossed by ten paved roads, including a major state highway. Civilians without any prior authorization are regular visitors to unrestricted areas of the Fort or regularly pass through it, either by foot or by auto, at all times

> of the day and night. Civilians are welcome to visit soldiers and are welcome to visit the Fort as tourists. They eat at the base and freely talk with recruits in unrestricted areas. Public service buses, carrying both civilian and military passengers, regularly serve the base. A 1970 traffic survey indicated that 66,000 civilian and military vehicles per day entered and exited the Fort. Indeed, the reservation is so open as to create a danger of muggings after payday and a problem with prostitution." *Id.* at 851.

Most recently, in *United States v. Kokinda*, *supra*, a plurality of this Court rejected the argument that a post office walkway was a public forum because it was open to the public:

> "Postal entryways, like the walkways at issue in *Greer*, may be open to the public, but that fact alone does not establish that such areas must be treated as traditional public fora under the First Amendment." 110 S. Ct. at 3121.

Therefore, it is clear that the lack of restriction to entry to the Port Authority air terminals does not make them public fora.

Finally, it is equally clear that the usefulness of government property as a site for expressive activity does not make such property a traditional public forum under applicable Supreme Court precedent. In *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), which held that lampposts are not public fora for the posting of signs, this Court rejected in unequivocal terms the proposition that a publicly-owned facility is a public forum because it would be a useful place for the communication of ideas:

> "Lampposts can of course be used as signposts, but the mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted. *Cf., United States Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. at 131." *Id.* at 814 (footnote omitted); *see also United States v. Albertini*, 472 U.S. at 686; *Greer v. Spock*, 424 U.S. at 838 n.10.

Similarly, in *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981), this Court held that household letterboxes were not public fora despite the fact that they are useful as vehicles for the communication of ideas. 453 U.S at 130 n. 6. Indeed, the Court viewed the desirability of the letterboxes as a device for appellees' communication of their ideas as the "causal factor which led to [the *Greenburgh*] litigation." *Id.* at 123. Nevertheless, the Court upheld the Postal Services' ban on the placement of circulars in letterboxes on the grounds that it was reasonable in light of the letterboxes' purpose of serving as receptacles for items transmitted through the United States mail. *See id.* at 132. As this Court noted,

> "[The dissent's] analysis assumes that simply because an instrumentality 'is used for the communication of ideas or information,' it thereby becomes a public forum. Our cases provide no support for such a sweeping proposition. Certainly, a bulletin board in a cafeteria at Fort Dix is 'specifically used for the communication of information and ideas,' but such a bulletin board is no more a 'public forum' than are the street corners and parking lots found not to be so at the same military base. *Greer v. Spock*, 424 US 828 (1976). Likewise, the advertising space made available in public transportation in the city of Shaker Heights is 'specifically used for the communication of information and ideas,' but that fact alone was not sufficient to transform that space into a 'public forum' for First Amendment purposes. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)." *Id.* at 130 n.6.

Consequently, it is clear that their usefulness as sites for expressive activity does not make the Port Authority air terminals public fora.

The lower court decisions relied upon by Plaintiffs holding airports to be public fora ignore the reasoning of the decisions of this Court in *Lehman*, *Greer*, *Kokinda*, *Taxpayers for Vincent* and *Greenburgh Civic Ass'ns*. The circuit court decisions which hold airports to be public fora are *not* based upon a

finding that the purpose of airports is to communicate ideas or that airports traditionally serve that function for adjacent communities. Rather, those decisions rely on factors which this Court has held are *not* determinative of public forum status.

For example in *Kuszynski v. City of Oakland*, 479 F.2d 1130 (9th Cir. 1973), the Ninth Circuit held that Oakland's airport was a public forum, it was public property, *id.* at 1131, using "public" to refer to government ownership or unrestricted access. Similarly, in *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983), *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982), and *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir. 1975), *cert. denied*, 421 U.S. 992 (1975), the respective circuits held that the airports in question were public fora because airport concourses physically resemble city streets, because the public had unrestricted access to the airports and because large numbers of people used the airports.[20] *See U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d at 764; *Fernandes v. Limmer*, 663 F.2d at 627; *Chicago Area Military Project v. City of Chicago*, 508 F.2d at 925.[21]

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[20] *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968), *cert. denied*, 393 U.S. 940 (1968), which addresses leafleting and related activity in the Port Authority Bus Terminal in midtown Manhattan, suffers from the same defect in reasoning. *Wolin*, which was decided before development of public forum analysis, held that the bus terminal, whose hallways resemble city streets, was an appropriate place for such activity because of its open access and the number of persons who use it each day. *Id.* at 89. As set forth above, this reasoning is inconsistent with this Court's public forum decisions. Significantly, *Wolin* did not find that the bus terminal had public communication as a purpose, as is required by forum analysis, but rather merely found that leafleting and solicitation would not be physically incompatible with the terminal's transportation uses. *Id.* at 90.

[21] A number of other circuit court decisions holding airports to be public fora merely rely on prior circuit court decisions so holding. *See Jamison v. City of St. Louis*, 828 F.2d 1280 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988); *Jews for Jesus, Inc. v. Board of Airport Comm'rs*, 785 F.2d 791 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987); *Rosen v. Port of Portland*, 641 F.2d 1243, 1246 (9th Cir. 1981); *ISKCON v. Rochford*, 585 F.2d 263, 267 (7th Cir. 1978). Another circuit court decision treats an airport as a public forum without describing it as such or explaining why that classification was appropriate. *ISKCON v. Eaves*, 601 F.2d 809 (5th Cir. 1979).

Consequently, these circuit court decisions are not persuasive since their rationale is contrary to the public forum principles enunciated by this Court.

D. Plaintiffs' Discussion Of Places Other Than Airports Does Not Establish That The Port Authority Air Terminals Are Public Fora.

In arguing that Port Authority air terminals are public fora, Plaintiffs ignore the record in this case establishing the purpose and characteristics of the Port Authority air terminals. Instead, Plaintiffs attempt to rely on secondary sources, regarding current urban planning issues and the history of other kinds of transportation facilities to establish that the Port Authority airports are public fora. Plaintiffs' discussion of secondary sources is thus irrelevant, and is, in addition, inaccurate.

Plaintiffs' reference to the alleged decline of downtown street life by the development of skyways and other street alternatives in city centers is clearly irrelevant to the issue at bar. The merits or demerits of such developments should be debated by planning commissions or zoning boards who determine the nature of our cities. *See, e.g.*, W. Whyte, *City*, 193-221 (1988). Any perceived failure of responsible planning bodies to foster the development of urban streetscapes provides no basis for holding that the Port Authority air terminals are public fora.

Plaintiffs' descriptions of wharves, Ellis Island and rail terminals are not only irrelevant to the case at bar, but are also misleading. The issue before the Court is not the public forum status of those places, today or in the past, but rather the public forum status of the Port Authority air terminals, which are very different from the historical sites discussed by Plaintiffs.

First, the public forum status of wharves, and their uses as sites of the distribution of literature, are clearly irrelevant to the case at bar because unlike air terminals, wharves "served as business streets". Brief of Petitioners and Cross-Respondents ("Plaintiffs' Brief") at 22, *quoting*, J.H. Kemble, *San Francisco Bay: A Pictorial Maritime History* 16 (1957). Furthermore, it appears that the "exchange of ideas" in colonial port districts

occurred in private places, such as clubs, coffee houses and taverns. R.D. Brown, *Knowledge Is Power: The Diffusion Of Information In Early America, 1700-1865*, 112-15 (1989).

Second, the alleged role of rail terminals as public fora is irrelevant because rail terminals, unlike Port Authority air terminals, are located in the center of a city. If the concourse of Grand Central Station or the waiting room of a small town rail depot served as a meeting place for people going about their daily business, it was because the rest of the community was a sidewalk's width away. *See* H.R. Grant & C.W. Bohi, *The Country Railroad Station in America*, 8-9 (1978); W.D. Middleton, *Grand Central* 109 (1978). Clearly, the same is not true of the Port Authority's air terminals. Although two people in Midtown Manhattan might agree to meet "under the golden clock" of Grand Central Terminal whether or not they were going to take a train, *see* W.D. Middleton, *Grand Central* 109 (1978), it is highly unlikely that two people who had no intention of taking air flights would agree to meet at any of the Port Authority airports.

Moreover, contrary to Plaintiff's assertions, as an historical matter, it is far from clear that rail stations and terminals served as public fora in the First Amendment sense. Plaintiffs fail to document that solicitation and distribution of literature actually occurred at railroad terminals. Plaintiffs also ignore the fact that railroad terminals were privately owned, and, therefore, any solicitation or distribution of literature which took place was at the pleasure of the private entities which owned the terminals. *See generally United Transportation Union v. Long Island Rail Road Co.*, 455 U.S. 678, 686 (1982); H.R. Grant & C.W. Bohi, *The Country Railroad Station in America*, 11-15 (1978).[22]

Third, with regard to Ellis Island, it does not appear that it was open to all who wished to distribute literature, much less solicit. Sources relied upon by Plaintiffs reveal that some religious and other private groups were authorized to provide social services to indigent immigrants out of offices established for that

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[22] Similarly, virtually all intercity terminals in the United States are privately owned. *See* U.S. Department of Transportation, *The Intercity Bus Terminal Study*, 31 (1984) (5.8% of bus terminals are government owned).

purpose, and that literature was distributed in the course of those activities.[23] 3 National Park Service, *Statue of Liberty/Ellis Island National Monument Historical Resources Study*, 903-05 (1984); New York Bible Society, *78th Annual Report*, 7 (1902); M.J. Shapiro, *Gateway To Liberty*, 152 (1986).

Of course, such activity in air terminal immigration areas, today's analogue to Ellis Island, would be unthinkable. Entry into such areas is prohibited to all, except passengers, airline crew, law enforcement personnel and air carrier, airport and airport tenant employees bearing appropriate identification. 19 C.F.R. §§122.181-122.182 (1991).

E. Plaintiffs' Discussion of Air Terminals Does Not Establish That The Port Authority Air Terminals Are Public Fora.

Plaintiffs' discussion of air terminals completely ignores the record in this case, and instead relies only on secondary sources. Significantly, this discussion identifies no long tradition of airport terminals having served as places for the distribution of literature and solicitation of funds. Thus, although airports have existed for approximately 60 years, Plaintiffs refer to only two decades' experience of such activity. *See* Plaintiffs' Brief at 39; H.V. Hubbard, M. McClintock & F.B. Williams, *Airports: Their Location, Administration and Legal Basis*, 8 (1930) (807 airports in United States as of 1930). More importantly, the so-called "tradition" of solicitation and the distribution of literature at commercial airports has existed only because of litigation against airports, much of which was commenced by Plaintiffs. *See* Plaintiffs' Brief at 1a-1b. In essence, Plaintiffs seek to create a binding rule in this Court because of their success, except for the Second Circuit, in the lower courts. If Plaintiffs' claim were

[23] Interestingly, these activities were not always benign. Some missionaries abused their trust and assisted in the economic exploitation of immigrants. M.J. Shapiro, *Gateway To Liberty*, 153-54 (1986). In addition, in one instance, the distribution by missionaries at Ellis Island of Christian bibles, with the apparent approval of the United States government, to Jewish immigrants fleeing persecution for their religion, caused one Commissioner of Immigration to criticize the practice because it would engender fears of persecution in this country. *Id.* at 154.

accepted, it would completely undermine meaningful review of lower court decisions by this Court.

Plaintiffs also attempt to rely on secondary sources to create an impression that airports are a form of general shopping mall, and thus the facilitation of air travel is only one of many airport purposes. The most obvious error in this argument is that it completely ignores the record in this case which establishes that all planning and operational decisions and all facilities and services at Port Authority air terminals are intended to facilitate air travel and virtually all who come to the Port Authority air terminals do so for air travel-related purposes. (Superintendent's Statement, ¶¶ 41-42, 63-64 (JA 454, 459)).

Moreover, the mere presence of ancillary services for the convenience of air travellers cannot logically render airports a public forum. A hospital or courthouse does not become a public forum because it maintains a cafeteria, newsstand, or gift shop. Recently, in *Kokinda*, a plurality of this Court rejected the claim that the presence of non-postal automatic teller machines ("ATM's") in post offices rendered them public fora. *See* Supplemental Brief for Respondents, *United States v. Kokinda*, __ U.S. __, 110 S. Ct. 3115 (1990) (No. 88-2031).

Furthermore, Plaintiffs' references are misleading since the very sources they rely on make it clear that ancillary facilities at airports such as restaurants and retail stores are intended to serve *passengers*, not the general population. See Doughty, *supra* note 13, at 7; IATA Manual, *supra* note 12, §§ 3.5.5.3, 3.5.10.1; Irsfeld, *Airport Concession Reflect New Awareness of Market Demands*, Airport Services, May 1981, 40, 44;[24] McGinley, *Airports Try to Ease the Pain of Waiting With New Ways for Fliers To Spend Money*, Wall St. J., Aug. 21, 1990, B1; Weinstein and Madrigal,

[24] "'It's true *people go to [the] airport to fly, not to eat*,' [says McDonald's Airport Development Office Manager.] But McDonald's has found that if *travelers can get a quick bite* someplace with which they're familiar and that . . . *won't make them miss their flights* or empty their wallets, they'll consider eating . . . ." Irsfeld, *Airport Concession Reflect New Awareness of Market Demands*, Airport Services, May 1981, 40, 44 (emphasis added).

supra note 14, 18-20; A.T. Wells, *supra* note 12, 154. Significantly, the most recent source relied upon by Plaintiffs describes the airport concession market as consisting *only* of the same travel related groups described as users of the Port Authority air terminals, *i.e.*, travelers, "meeters and greeters" and airline/airport employees. *Id.*; *see* Superintendent's Statement, ¶ 63 (JA 458).[25]

The fact is that airport retail services play only "a supporting role" in airport terminals. Plaintiffs attempt to rely heavily on two articles regarding airport retail services appearing in *Airport Services* magazine to give the impression that such services are the focus of air terminal activities. However, an examination of the tables of contents of that magazine over recent years belies any such conclusion since only a very few articles have been devoted to that subject.[26] In addition, more in depth studies of airport planning and management address retail services in only a cursory manner.[27]

[25] Another error made by Plaintiffs is characterizing the efforts of airport operators to restrain airport concession prices as an integration with downtown. These efforts, however, are merely intended to prevent unfair advantage being taken of the air traveler, who is a captive audience in an airport. Irsfeld, *Airport Concessions Reflect New Awareness of Market Demands*, Airport Services, May 1989, 40, 47; McGinley, *Airports Try to Ease the Pain of Waiting With New Ways for Fliers to Spend Money*, Wall St. J. Aug. 21, 1990, B1 (hereinafter "McGinley").

[26] In 1989 only two of 62 feature articles were devoted to airport retail services; in 1990, only one of 48 feature articles was devoted to airport retail services; and in 1991 only two of 37 feature articles were devoted to airport retail services.

[27] *See* N. Ashford & P.H. Wright, *Airport Engineering* (2d ed. 1984) (424 page book, 41 page chapter on passenger air terminals of which 12 lines refer to concessions); N. Ashford, H.P.M. Stanton & C. Moore, *Airport Operations* (1984) (467 page book, 41 pages on passenger terminal operations of which only 3 1/2 pages (exclusive of tables and photographs) address *all* commercial activities including red cap services, telephones, parking, auto rental, as well as restaurants and other shops); R. Horonjeff & F.X. McKelvey, *Planning & Design of Airports*, (3d ed. 1983) (604 page book, 77 page chapter on passenger air terminals of which only 1 page refers to retail services); P.H. Wright & N.J. Ashford, *Transportation Engineering* (3d ed. 1989) (85 pages on airports, 22 pages on passenger air terminals of which only 12 lines refer to concessions).

Even if it is true that "[r]etail facilities are currently one of the most active areas of change in the airport facility", Doughty, *supra* note 13, at 9, it is because "[t]he main things that drive passengers batty - lousy airline service, surly ticket agents and bad weather - are beyond an airport's control." McGinley, *supra* note 25. In any event, it is clear that efforts to improve ancillary facilities for the benefit of air passengers have no bearing on an air terminal's public forum status. Certainly, efforts by a hospital or courthouse administrator to improve the goods and services in her cafeteria, newsstand or gift shop are irrelevant to the public forum status of the hospital or courthouse.[28]

In sum, the presence of concessions in airport terminals does not change the fact that air terminals are non public fora because their sole purpose is the facilitation of air travel, not public assembly and debate.

[28] Similarly, Plaintiffs' description of efforts to create terminals of architectural merit and the presence of artwork in airports add nothing to the First Amendment analysis of airports. Presumably all public buildings are intended to be buildings of merit, and attempts by airports to beautify air terminals pursuant to laws mandating the expenditure of 0.5 - 1.5% of construction budgets to purchase art do not distinguish airports from any other public buildings. A General Services Administrative policy allows 0.5% of the construction fund for all federal buildings to be used for fine art. *See* Note, *Injecting a Role of Duty Into the Doctrine of Droit Moral*, 74 Iowa L. Rev. 629, 673 n.393 (1989).

POINT II

THE PORT AUTHORITY'S RESTRICTION OF SOLICITATION AND THE DISTRIBUTION OF LITERATURE TO THE SIDEWALKS ADJACENT TO AIR TERMINAL BUILDINGS IS A LAWFUL RESTRICTION OF FIRST AMENDMENT ACTIVITY IN A NONPUBLIC FORUM.

The Court of Appeals correctly applied the public forum analysis developed by this Court to hold that the Port Authority air terminals are not public fora[29], and that repetitive solicitation may be prohibited within their interiors. However, the Court of Appeals erred in holding invalid the similar Port Authority restriction on distribution of literature. It is respectfully submitted that under the decisions of this Court, both restrictions are valid because they are viewpoint-neutral and reasonable in light of the purpose of the Port Authority air terminals to facilitate safe, efficient and convenient air transportation.

A governmental entity is given much greater discretion to restrict First Amendment activities in a nonpublic forum where it is acting as a manager of facilities, than in a public forum where it is acting as a regulator. *See United States v. Kokinda*, 110 S. Ct. at 3119. Therefore, in a nonpublic forum, any reasonable restriction affecting expressive activity that preserves

[29] Plaintiffs, some *amici*, and a recent panel of the Second Circuit, *see Longo v. United States Postal Service*, __F.2d__, 1992 WL 3512 (2d Cir. Jan. 13, 1992), at 6, have stated that the Court of Appeals did not hold that the Port Authority air terminals are nonpublic fora. However, the court below specifically stated "[t]he sole issue on appeal . . . is whether the terminal areas are traditional public fora for protected speech." (PA 10). In addition, the Court of Appeals described the holdings of other lower courts that airports are public fora, and stated it was not following those decisions (PA 10-11). Finally, commentary on the Court of Appeals decision described it as holding that the Port Authority air terminals were not public fora. *See Summary of Orders*, 60 U.S.L.W. 3464 (1992); Bukowski, *Second Circuit Summaries*, N.Y.L.J., Mar. 4, 1991, 5. In any event, the public forum issue is squarely presented to this Court irrespective of one's interpretation of the Court of Appeals' opinion on that subject.

the forum for its "intended purposes" is constitutional provided the reduction does not discriminate against expressions of a particular viewpoint. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 46, 49. As held by this Court:

> "The State, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley v. Florida*, 385 U.S. 39, 47 (1966), *quoted in*, *Greer v. Spock*, 424 U.S. at 836.

In recognition of government's managerial role with respect to a nonpublic forum, this Court has emphasized that a viewpoint-neutral restriction on expressive activity in a nonpublic forum "need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation."[30] *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. at 808 (emphasis in original). And, in a nonpublic forum, types of expressive activity can be completely prohibited.

> "[P]roperty owned or controlled by the government which is *not* a public forum may be subject to a prohibition of speech, leafleting, picketing, or other forms of communication without running afoul of the First Amendment." *United States Postal Service v. Council of Greenburgh Civic Assn's*, 453 U.S. 114, 131 n.7 (1981) (emphasis in original).

In the case at bar, the granting of broad discretion to the Port Authority to operate its air terminals is especially appropriate. The management of air terminals, indeed of airports in general, requires the exercise of detailed control over a complex environment to achieve a specific purpose – the safe, efficient and convenient facilitation of air travel.[31]

[30] Consequently, the allegation that less restrictive regulations could more precisely address the Port Authority's concerns, even if true, is not relevant to the validity of regulations in a nonpublic forum.

[31] The Port Authority's managerial, rather than regulatory, role as airport operator was recognized in an action challenging the Port Authority's

(Footnote continued)

It is evident, that the Port Authority regulations challenged herein satisfy the viewpoint-neutral reasonable test used by this Court to judge the validity of restrictions on expressive activity in a nonpublic forum. First, the Port Authority's restrictions on solicitation and the distribution of literature are viewpoint-neutral, since they apply to all solicitation and distribution of literature without regard to point of view. *See Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. at 806. Second, the restrictions are reasonable in view of the Port Authority's legitimate managerial interests in preserving its air terminals for the air transportation purpose to which they are dedicated.

Significantly, only two types of expression are banned in the Port Authority air terminals – repetitive solicitation and distribution of literature – since these activities have the highest adverse effects on air travelers in an airport. More specifically, solicitation and the distribution of literature exacerbate the serious problems of pedestrian congestion at one of "society's choke-points" (PA 14), result in the annoyance of air travelers who are captive audiences, create risks of fraud and generally distract police and other airport personnel from their important air travel responsibilities. *See, e.g., Heffron v. ISKCON*, 452 U.S. at 653-54; *ISKCON v. Rochford*, 585 F.2d 263, 268-69 (7th Cir. 1978); *International Caucus of Labor Committees v. Metropolitan Dade County*, 724 F. Supp. 917, 927 (S.D. Fla. 1989); *Gannett Satellite Information Network, Inc. v. Berger*,

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imposition of certain fees as a violation of the Commerce Clause. In that case, the District Court opinion described the Port Authority's role as follows:

> "[W]e conclude that the Port Authority's activities in determining to whom it will provide permittee services more closely resembles the activities of a merchant in the private sector. It is clear that . . . the Port Authority [is not] the market regulator in the present context . . . ." *Transport Limousine of Long Island, Inc. v. The Port Authority of New York and New Jersey*, 571 F. Supp. 576, 581 (E.D.N.Y. 1983).

716 F. Supp. 140, 150-51 (D.N.J. 1989), *aff'd in part, rev'd in part on other grounds*, 894 F.2d 61 (3d Cir. 1990).[32]

As held by the Court of Appeals in the case at bar, the problem of congestion is especially acute at the Port Authority airports:

> "[The] record establishes that pedestrian congestion is one of the greatest problems facing the three [airports]. Much of the facilities in question was built before [the introduction of] wide-body aircraft, and a pressing need for expansion exists." (PA 14).

And, as this Court has recognized, solicitation is very disruptive of pedestrian flow:

> "Solicitation requires action by those who would respond: the individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card." *United States v. Kokinda*, 110 S. Ct. at 3123; *see Heffron v. ISKCON*, 456 U.S. at 653.

The distribution of literature has similar effects on pedestrian flow. Air passengers must alter their path to avoid the distributor, or pause to take literature and perhaps stop to read it or to throw it in a wastebin. Significantly, Plaintiff's themselves concede that "[l]iterature distribution . . . might well be as disruptive to a traveller 'hurrying to catch a plane or to arrange ground

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[32] The Port Authority's decision to restrict solicitation and leafleting to the sidewalks adjacent to the Port Authority air terminals to advance the purpose for which the air terminals were created is mirrored by the actions of other airport operators, as evidenced by the great number of reported decisions concerning such actions. *See* Brief of Petitioners – Cross-Respondents, at 1a-1b. The proliferation and persistence of this litigation reflects the continuous desire of airport operators to exercise their proprietary authority over airports with respect to expressive activity as part of their efforts to facilitate safe, efficient and convenient air transportation.

transportation' as a request for a voluntary donation." Petition for Writ of *Certiorari*, at 22 (citation omitted). And, of course, if Plaintiffs were entitled to engage in such activity, others would have the right to do so as well. As noted by this Court in *Heffron v. ISKCON*,

> "[T]he inquiry must not only involve ISKCON, but all other organizations that would be entitled to distribute, sell or solicit if the . . . rule may not be enforced with respect to ISKCON." 452 U.S. at 654; *accord*, *Clark v. Community for Creative Non-Violence*, 468 U.S. at 296-97.

The Port Authority's regulations, by limiting solicitation and distribution of literature to sidewalk areas, allows the Port Authority to control the ill effects of such activity by enabling the Port Authority to better monitor such activity by Plaintiffs and others to identify conduct that violates the law or interferes with airport operations (Sloane Supplemental Affidavit, ¶ 11 (JA 514)). The experience of the Port Authority itself, as well as of other airport operators, demonstrates the need for intensive monitoring. Port Authority records disclose that members of ISKCON have violated the existing rules under the interim agreement regarding solicitation and distribution of literature over the period 1975 through 1986, including incidents involving some form of fraud, deception, or larceny (Sloane Supplemental Affidavit, ¶ 12 (JA 514-15)). The Port Authority is also aware that members of ISKCON have engaged in misconduct elsewhere (*Id.* ¶ 13 (JA 515); Douglas Affidavit, ¶¶ 9, 16-18, 22-26 (JA 73, 77-80, 81-84)). The association of improper behavior with ISKCON's solicitation and distribution of literature has been observed by at least one federal court in *ISKCON v. Barber*, 506 F. Supp. 147, 159-63 (N.D.N.Y. 1980), *rev'd on other grounds*, 650 F.2d 430 (2d Cir. 1981), *cert. denied*, 451 U.S. 971 (1981).

Finally, the reasonableness of the restrictions at bar is demonstrated by the fact that the restrictions do not deprive Plaintiffs of access to the people who use the air terminals. More than 97% of the people who are in the terminals use the sidewalks for ingress or egress (Sloane Supplemental Affidavit,

¶ 14 (JA 515-16); Hurst Supplemental Affidavit, ¶¶ 15-17 (JA 530-32)). Thus, Plaintiffs may direct solicitation and the distribution of literature to virtually all who use the air terminal buildings, albeit outside of those buildings, and may engage those people in conversation both inside and outside of the air terminal buildings.

Based on the foregoing, it is respectfully submitted that the Port Authority's restrictions upon solicitation and the distribution of literature are valid as reasonable, viewpoint neutral-restrictions that preserve the air terminals for their dedicated purpose and serve the legitimate managerial interests of the Port Authority as airport operator in facilitating safe, efficient, and convenient air travel.

POINT III

THE PORT AUTHORITY'S RESTRICTION OF SOLICITATION AND THE DISTRIBUTION OF LITERATURE TO THE SIDEWALKS ADJACENT TO AIR TERMINAL BUILDINGS WOULD BE LAWFUL EVEN IF THE AIR TERMINALS WERE PUBLIC FORA.

Even if the Port Authority air terminals were public fora, the restriction of solicitation and distribution of literature to the sidewalks adjacent to air terminal buildings would be valid under the principles of public forum analysis.[33]

It is well established that even in a public forum, the government is not powerless to regulate First Amendment activity. Although it is true that all communication may not be excluded from a public forum, content-neutral regulations may be enforced if they are reasonable and narrowly tailored to serve significant governmental interests, and leave open ample alternative channels of communication. *E.g.*, *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 46; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The Port Authority's restriction of solicitation and distribution of literature to sidewalks adjacent to air terminal buildings satisfies this test.

First, the Port Authority Regulations are content-neutral because all solicitation and distribution of literature is treated identically, regardless of content. Any person who wishes to solicit funds or distribute literature at the airports may do so

[33] The Superintendent respectfully submits that this issue is properly before the Court, although not briefed before the Court of Appeals. The issue is within the scope of the questions presented in both the Petition for A Writ of *Certiorari* and the Cross-Petition for A Writ of *Certiorari* herein. Moreover, after briefing and argument in the Second Circuit, this Court indicated for the first time, per the concurring opinion of Justice Kennedy in *United States v. Kokinda*, __ U.S. __, 110 S.Ct. 3115 (1990), that the requisite alternative means of communication could be outside the site desired for expressive activity. *See Blonder-Tongue Laboratories, Inc. v. University Illinois Foundation*, 402 U.S. 313, 320 n.6 (1971).

only on air terminal building sidewalks. *United States v. Kokinda*, 110 S. Ct. at 3124; *Clark v. Community for Creative Non-Violence*, 468 U.S. at 295; *Heffron v. ISKCON*, 452 U.S. at 649.

Second, as established in Point II, the Port Authority restriction on solicitation and the distribution of literature is reasonable in view of the managerial interests of the Port Authority as airport operator in facilitating safe, efficient and convenient air travel.

Third, the Port Authority restriction is narrowly tailored since it prohibits only the two types of expressive activity, repetitive solicitation and distribution of literature, which cause the most interference with air travelers. Furthermore, the restriction is narrowly tailored since it prohibits such activity only in the *interior* areas of the Port Authority air terminals. The Port Authority regulations restrict solicitation and the distribution of literature to the sidewalks adjacent to the air terminals in order to reduce the undesirable effects of such activities upon airport operations and to improve the Port Authority's ability to monitor those effects. The undesirable effects of solicitation and the distribution of literature at which the regulations are directed are increased congestion, annoyance of captive audiences, and fraud.

It should also be noted that it is untrue, as suggested by the District Court, that a regulation in a public forum is invalid because it may be possible to write a more narrowly tailored regulation (PA 45). As held by this Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989):

> "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . [a] regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800.

Clark v. Community for Creative Non-Violence, *supra*, is also on point. In *Clark*, this Court rejected a challenge on First Amendment grounds to a National Park Service denial of permission for demonstrators to camp and sleep in Washington,

D.C. parks in order to call attention to the plight of the homeless. 468 U.S. at 291-92. The Park Service rule prohibited camping and sleeping as a way of reducing wear and tear on parks, although it permitted demonstrations 24 hours a day. *Id.* at 290, 296.

This Court reversed the holding of the Court of Appeals that the rule was invalid because less restrictive alternatives such as reducing the size or frequency of demonstrations irrespective of whether they included camping would serve the Park Service's interest in preserving the parks. *Id.* at 299. In rejecting the lower court's reasoning, this Court stated that:

> "[The Court of Appeals'] suggestions represent no more than a disagreement with the Park Service over how much protection the core parks require or how an acceptable level of preservation is to be attained. We do not believe, however, that either *United States v. O'Brien* or [our] time, place, or manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained." *Id.* at 299 (footnote omitted).

Addressing the Park Service rule itself, this Court stated:

> "Perhaps [the Park Service's] purposes would be more effectively and not so clumsily achieved by preventing tents and 24-hour vigils entirely in the core areas. But, the Park Service's decision to permit nonsleeping demonstrations does not, in our view, impugn the camping prohibition as a valuable, but perhaps imperfect, protection to the parks. If the Government has a legitimate interest in ensuring that the National Parks are adequately protected, which we think it has, and if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a reasonable regulation of the manner in which a demonstration may be carried out." *Id.* at 297.

Furthermore, this Court reiterated the principle recognized in *Heffron v. ISKCON, supra*, that the validity of a regulation is not to be determined solely by reference to the conduct of the plaintiff; rather, a rule is valid if it would prevent harm caused by the impact of the conduct of others similarly situated. *Id.*

The Port Authority regulations at issue here meet the narrowly tailored standard as applied by this Court in *Ward* and *Clark* since they reduce the undesirable effects of solicitation and distribution of literature upon airport operations and improve the Port Authority's ability to monitor those undesirable effects. Whether or not any "less-speech-restrictive-alternative", 491 U.S. at 800, regulations would achieve the Port Authority's purpose "more effectively and not so clumsily", 468 U.S. at 297, the Port Authority's regulations are lawful since they "are not substantially broader than necessary" to achieve the Port Authority's goals. *Id.*

Finally, the Port Authority's regulations leave open ample alternative means of communication. First, all types of speech other than solicitation and the distribution of literature are permitted. Second, more than 97% of the people who utilize the terminals use the sidewalks, where solicitation and distribution of literature is permitted. (Sloane Supplemental Affidavit, ¶ 14 (JA 515-16); Hurst Supplemental Affidavit, ¶¶ 15-17 (JA 530-32)).

As established by the foregoing, the Port Authority's restrictions on solicitation and the distribution of literature are content-neutral, reasonable, narrowly tailored to serve significant governmental interests and leave open ample alternative means of communication. Therefore, it is respectfully submitted that the Port Authority regulations are lawful, even if the air terminals were public fora.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court affirm the judgment of the United States Court of Appeals for the Second Circuit, entered February 8, 1991, insofar as it upheld the validity of the Port Authority's restriction on solicitation and reverse such judgment insofar as it held invalid the Port Authority's restriction on distribution of literature, and remand the action with instructions that the complaint be dismissed.

Dated: New York, New York
March 10, 1992

Respectfully submitted,

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